



September 26, 2023

Chair Brenda Mallory
Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503

Dear Chair Mallory,

As governors who frequently deal with the on-the-ground challenges of federal regulations, we write to address common concerns related to the Council on Environmental Quality's ("CEQ") National Environmental Policy Act Implementing Regulations Revisions Phase 2 ("Proposed Rule"). Although we were encouraged by several of the NEPA-related reforms Congress included in the Fiscal Responsibility Act (P.L. 118-5), we believe CEQ's Proposed Rule will undermine the impact of several of those reforms. The stated purpose for the Proposed Rule is to increase the efficiency and effectiveness of the NEPA process. It fails in both regards. Instead, the Proposed Rule eliminates the clarity of the existing rule, decreases NEPA's efficiency, and drastically increases the potential for litigation related to NEPA decisions.

The Proposed Rule would largely undo many of the changes promulgated on July 16, 2020 ("2020 Rule"), which were designed to increase the overall efficiency and effectiveness of the NEPA process. Now, only three years later, CEQ once again proposes wholesale revisions to the implementing regulations. Implementing sweeping changes after only 3 years of application creates significant confusion and decreases the certainty associated with CEQ's regulations.

Additionally, the general direction of the Proposed Rule will significantly impact management within the individual states, incentivize increased litigation, and decrease the overall efficiency of the process. For instance, CEQ is recommending removal of the language that describes NEPA as a purely procedural statute, even after admitting in the Proposed Rule that this is an accurate statement. The rationale for this change suggests NEPA has been used in the past, or may in the future be treated, as merely a "check-the-box" exercise. There is no validity to this concern, as the processes outlined in NEPA have always had tremendous on-the-ground effect, despite its procedural nature. Moreover, removal of the "procedural" language changes at least the perception of NEPA's effect, if not the reality, and increases confusion as to its applicability. This is concerning, particularly when there are multiple changes in the Proposed Rule that diminish the value of state-specific input in the NEPA

process. Moreover, any increase in confusion will result in increased litigation, a general concern we have with many of the changes in the Proposed Rule.

In addition to creating confusion, many of the changes in the Proposed Rule invite significant additional legal challenges. For instance, CEQ is recommending the removal of the exhaustion process for public comments and allowing agencies discretion to determine whether to consider an issue or whether it was forfeited in the comment process. While CEQ suggests agencies could make these determinations on an individual basis to address “unusual circumstances,” the mere allowance of such discretion will significantly increase the opportunity for litigation and inefficiency. Public involvement is a necessary element of the NEPA process. However, allowing agencies discretion to consider concerns not properly raised in the comment process and/or allowing legal challenges absent proper procedural constraints will have a tremendous effect on the efficiency of the NEPA process.

Similarly, the Proposed Rule encourages legal challenges regarding the sufficiency of cumulative effects analysis. Phase 1 of these proposed NEPA changes, issued by CEQ on April 20, 2022, made it considerably more difficult and speculative to determine what qualifies as cumulative effects and how those effects must be evaluated in the NEPA process. The Proposed Rule goes even further, demanding, for example, increased consideration for climate change-related effects, including effects of climate change on the proposed action and alternatives (which may in turn alter the effects of the proposed action and alternatives). This is a major weapon already employed by litigants, and agencies spend enormous time and resources attempting to address this requirement, both within the courtroom and without. The Proposed Rule does not address this need for reform and only adds to the confusion.

As Marlo Lewis, Jr. of the Competitive Enterprise Institute wrote, “NEPA reviews are concerned with ‘major’ federal actions ‘[significantly affecting the quality of the human environment](#).’ The GHG [greenhouse gas] emissions of even the largest infrastructure project are several orders of magnitude smaller than any quantity capable of having detectable effects on global temperatures. Climatically-inconsequential GHG emissions are not ‘significant’ effects for NEPA purposes.”

The Proposed Rule also places significant emphasis on public engagement, with particular focus on communities with environmental justice concerns. While we encourage increased public engagement, the Proposed Rule oversimplifies this topic and drastically increases the confusion associated with such involvement. For instance, governmental involvement in the management of wildlife resources is critical at early stages of the NEPA process, as states have primary jurisdiction over wildlife within their borders (except for endangered/threatened species). States must therefore be involved in the development of alternatives for NEPA consideration, while public involvement would significantly complicate an already difficult process. The Proposed Rule nevertheless suggests inclusion of “flexibility to agencies to tailor engagement strategies, considering the scope, scale, and complexity of the proposed action and alternatives, the degree of public interest, and other relevant factors.” Allowing this level of engagement in the development of alternatives and proposed actions significantly diminishes the role of the states, both as cooperating agencies and as participants in the NEPA process. States are not simply another stakeholder, and as such, state involvement must be given deference, especially in areas where the states possess the best information available. This clear delineation between governmental and public involvement must be reflected in NEPA regulations.

There are multiple suggestions in the Proposed Rule that will certainly cause further delays in the NEPA process, even if they do not result in litigation. For example, CEQ is proposing to-potentially require agencies to conduct new studies, investigations, or other forms of data collection to inform a NEPA analysis. Setting aside the potential for agencies to reach decisions before the existence of supportive science, this suggested change will add significant delay to the NEPA process. Similarly, the Proposed Rule suggests removing language that provides general guidance adopted in the 2020 Rule for the public commenting process. Without that guidance, public comments will increase in length, again contributing to the inefficiency of this process. This proposed change also conflicts with other rule provisions regarding the role of applicants and third parties in preparing draft NEPA documents and federal agencies independently reviewing rather than redoing such work. These are only a few examples from the Proposed Rule that will decrease the efficiency of NEPA, and we cannot support changes of this nature.

We recognize that some provisions of the 2020 Rule may need revision and clarification. However, the 2020 Rule increased the efficiency and effectiveness of the NEPA process. The examples provided herein demonstrate that the Proposed Rule undermines the progress made in the 2020 Rule by decreasing certainty and efficiency in the NEPA process, increasing the potential for litigation, and minimizing the role of state government.

We look forward to your prompt reply so we can continue to cooperate with CEQ and provide an informed perspective in these critical conversations. We also continue to support meaningful revisions to NEPA, where appropriate, but will not support changes that make the process less efficient, less effective, invite litigation, and/or fail to fully consider state-specific information in the NEPA process. Thank you in advance for your consideration.

Sincerely,



Governor Joe Lombardo
State of Nevada



Governor Spencer Cox
State of Utah



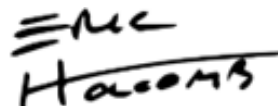
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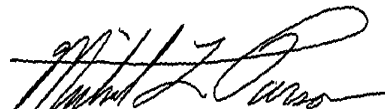
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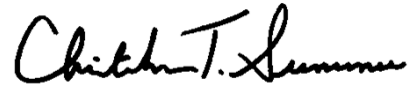
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